

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Diego F.,

Claimant,

v.

Inland Regional Center,

Service Agency.

OAH No. 2011031338

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on September 7, 2011.

Claimant's mother, Maria G, represented claimant who was present throughout the hearing.

Robert J. Mendes, Consumer Services Representative, Fair Hearings and Legal Appeals, represented Inland Regional Center (IRC), the service agency.

The matter was submitted on September 7, 2011.

ISSUE

Does claimant Diego F. remain eligible to receive regional center services and supports as a result of a developmental disability involving autistic disorder?

FACTUAL FINDINGS

Jurisdictional Matters

1. On March 22, 2011, claimant filed a Fair Hearing Request contesting IRC's determination that its original determination that he was eligible for services because he had a diagnosis of autistic disorder was clearly erroneous.

2. On September 7, 2011, the record was opened, documentary evidence and sworn testimony were received, arguments were given, the record was closed, and the matter was submitted.

Diagnostic Criteria for Autism

3. The DSM-IV-TR identifies the criteria necessary for the diagnosis of autism. As noted in that text, "Pervasive Developmental Disorders are characterized by severe and pervasive impairment in several areas of development reciprocal social interaction skills, communication skills, or the presence of stereotyped behavior, interests and activities." The group of disorders identified as Pervasive Developmental Disorders are Autistic Disorder, Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and Pervasive Developmental Disorder-Not Otherwise Specified. The DSM-IV-TR notes, "The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activities and interests." An individual must have a DSM-IV-TR diagnosis of "Autistic Disorder" to qualify for regional center services.

The DSM-IV-TR diagnostic criteria for "Autistic Disorder" are:

"A. A total of six (or more) items from (1), (2), and (3), with at least two from (1) and one each from (2) and (3)

1. qualitative impairment in social interaction, as manifested by at least two of the following:

a. marked impairments in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body posture, and gestures to regulate social interaction

b. failure to develop peer relationships appropriate to developmental level

c. a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people, (e.g., by a lack of showing, bringing, or pointing out objects of interest)

d. lack of social or emotional reciprocity

2. qualitative impairments in communication as manifested by at least one of the following:

a. delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)

b. in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others

c. stereotyped and repetitive use of language or idiosyncratic language;

d. lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level;

3. restricted repetitive and stereotyped patterns of behavior, interests and activities, as manifested by at least two of the following:

a. encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus

b. apparently inflexible adherence to specific, nonfunctional routines or rituals

c. stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)

d. persistent preoccupation with parts of objects.

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction; (2) language as used in social communication; and (3) symbolic or imaginative play.

C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder."

Evidence Presented At Hearing

4. Claimant is currently 8 years old. IRC previously determined he was eligible for services under a diagnosis of autistic disorder. In 2007 the examining psychologist recommended that claimant be re-tested in three years as he was beginning to exhibit social and communication behaviors that were incompatible with a diagnosis of autistic disorder.

5. On December 16, 2010, Thomas F. Gross, Ph.D., performed a psychological evaluation and determined that claimant did not have autistic disorder. Dr. Gross opined that claimant has features of pervasive developmental disorder. Claimant has been diagnosed with Attention Deficit Hyperactivity Disorder and would be receiving medication for that diagnosis that would hopefully “set the stage for more appropriate conduct when he is with peers.” Dr. Gross suggested the school have claimant evaluated by an occupational therapist to address his mother’s reported concerns regarding his difficulties with coordination and manipulation.

6. Claimant’s Individualized Education Program (IEP) demonstrated that he was eligible for services with a primary disability of autism and a secondary disability of Speech Language Impairment. The IEP documented that “while his sentences may seem immature, they resemble those that might be used by someone who is in the process of learning English as a second language.”¹

7. Paul Greenwald, Ph.D, an IRC staff psychologist, reviewed Dr. Gross’ report and claimant’s IEP and determined that he was no longer eligible for IRC services. Dr. Greenwald testified that Dr. Gross’ recent psychological evaluation noted numerous social behaviors that were incompatible with a diagnosis of autistic disorder and that the early intervention services that claimant received had successfully improved his condition such that a diagnosis of autistic disorder was no longer accurate. Dr. Greenwald testified about reliable research conducted in 1980 that demonstrated that early intervention can improve an autistic disorder which led to the creation of early intervention programs like the one in which claimant has participated at IRC. Dr. Greenwald also explained that an IEP determining a student is eligible for special education services is insufficient to establish regional center eligibility as school districts are governed by different regulations than those that govern IRC.

8. Maria G. testified that her son’s condition has greatly deteriorated since he was evaluated in December by Dr. Gross. She disagreed with IRC’s determination and Dr. Gross’ conclusion. While admitting that her son did not have “a severe amount of autism,” she asserted that “he did have parts of it” and she believed he was autistic. Maria G. testified that a psychiatrist has indicated her son has autism but she produced no recent evaluations or reports supporting that testimony.

¹ Claimant’s family speaks Spanish and an interpreter was used for this hearing.

LEGAL CONCLUSIONS

Burden of Proof

1. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.) IRC bore the burden of establishing that its original determination that claimant had a developmental disability was clearly erroneous as required by Welfare and Institutions Code section 4643.5, subdivision (b).

The Lanterman Act

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with a qualifying developmental disability, regardless of age or degree of handicap, and at each stage of life. The purpose of the Lanterman Act is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

3. The Lanterman Act is found at Welfare and Institutions Code section 4500 *et seq.* Welfare and Institutions Code section 4501 states:

“The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.”

4. Welfare and Institutions Code section 4512, subdivision (a), defines “developmental disability as “a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability . . . As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.”

5. Welfare and Institutions Code section 4643.5, subdivision (b), provides:

“An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous.”

Applicable Regulations

6. California Code of Regulations, title 17, section 54000, subdivision (a) provides:

“(a) ‘Developmental Disability’ means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.”

7. California Code of Regulations, title 17, section 54001, provides:

“(a) “Substantial disability” means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person’s age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

“(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

“(c) the Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

“(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

Evaluation

8. The Lanterman Act and corresponding Regulations established criteria claimants must meet in order to qualify for regional center services. When a regional center later determines that a client is no longer eligible for services it must demonstrate that its previous eligibility determination was “clearly erroneous.” Here, Dr. Gross performed a comprehensive psychological evaluation in 2010 which convincingly demonstrated that claimant no longer has a diagnosis of autistic disorder. Claimant offered no evidence to refute the documents and the credible, persuasive testimony offered by Dr. Greenwald.

Maria G.’s testimony was insufficient to establish that claimant currently has an autistic disorder diagnosis. Moreover, Maria G.’s testimony was contradicted by the behavior claimant exhibited during this hearing; he sat quietly during the entire proceeding, at times playing with his crayons and did not exhibit any of the wild behaviors described by Maria G. in fact, claimant’s behavior at this hearing was consistent with that reported by Dr. Gross in his 2010 evaluation.

Finally, that a school district provides special education services to a student under an autism disability is insufficient to establish eligibility for regional center services. Schools are governed by California Code of Regulations, Title 5 and regional centers are governed by California Code of Regulations, Title 17. Title 17 eligibility requirements for services are much more stringent than those of Title 5.

It is important to point out that during her testimony Maria G. queried if she should have her son re-tested by another psychologist in order to refute the findings in Dr. Gross’ report. Nothing in this decision precludes claimant from being retested by another practitioner who administers similar autism tests used by Dr. Gross and submitting the results of those tests to IRC for consideration should those tests conclude that claimant does have autistic disorder.

ORDER

Claimant Diego F.’s appeal from the Inland Regional Center’s determination that he is no longer eligible for regional center services and supports is denied. Claimant is

ineligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act and applicable regulations.

DATED: September 8, 2011

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.